

COPY

8*

Before The
COPYRIGHT OFFICE
Library of Congress
Washington, D.C.

RECEIVED

AUG 31 2005

GENERAL COUNSEL
OF COPYRIGHT

@CCAB 8/29/05

In the Matter of Rulemaking

Notice and Recordkeeping for Use of
Sound Recordings Under Statutory
License

Docket No. RM 2005-2

DOCKET NO.

RM 2005-2

COMMENT NO. 8

COMMENTS OF COLLEGIATE BROADCASTERS, INC.

Collegiate Broadcasters, Inc. ("CBI") hereby respectfully submits these comments in response to the Supplemental Request for Comments, published in the Federal Register on July 27, 2005 (the "Request").¹ The Request asks for further comments on the rules proposed by the Copyright Royalty Board ("CRB") in the April 27, 2005, notice of proposed rulemaking ("NPRM").²

CBI is an interested party in that it is an association of broadcasters and Webcasters located across the country at the nation's universities and colleges. CBI has approximately 250 members, the majority of which have at one time, are currently, or want to in the future "Webcast" sound recordings.

In these comments before the CRB, CBI includes references to "Educational Stations." These Educational Stations include all current and potential Webcasters that are directly operated by, or are affiliated with and officially sanctioned by, and the digital audio transmission operations of which are, during the course of the year, staffed substantially by students enrolled

¹ 70 Fed. Reg. 43364.

² 70 Fed. Reg. 21704.

* LATE

at, a domestically accredited primary or secondary school, college, university or other post-secondary degree-granting educational institution, but that is not a "public broadcasting entity," as defined in 17 U.S.C. § 118(g), qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. § 396. Further, these Webcasters are exempt from taxation under section 501 of the Internal Revenue code, have applied for such exemption, or are operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes.

I. Background.

CBI has contended and continues to believe that the current tribulations between the copyright owners and performers ("COPs") and the not-for-profit Webcasters – in particular, the Educational Stations – stem from a few basic problems with the proceedings and perceptions of certain of the participants.

The first problem started when the issues of rate determination and recordkeeping were separated. In a vacuum, the CARP and ultimately the Librarian adopted rates that were directly dependent on data collection, yet the feasibility of acquiring data from the various services was not fully and properly investigated. The CARP and Librarian apparently assumed, wrongly, that since the pre-existing services could provide the anticipated data that the other subsequent services would also be able to provide the same data.

The statutory license crafted by Congress covers a wide array of services, many of which were not represented while the record of the CARP was developed. The CARP itself recognized the dearth of information available to it regarding some services, including the Educational

Stations, then admonished CARP participants to provide such information, yet created a royalty scheme with the full knowledge of this paucity of critical information. From the CARP report:

“Unfortunately, determination of the willing buyer/willing seller fees for non-CPB affiliated, non-commercial radio stations (‘non-CPB broadcasters’) presents an extraordinary challenge. Despite admonitions to all counsel from the Panel as early as September 7, 2001 (well prior to the rebuttal phase), the record remains virtually barren respecting such broadcasters. *See* Tr. 9009-13. The record tells little about those non-CPB broadcasters that are represented by the NRBMLC, and virtually nothing about those that are not.”³

This lack of understanding of Educational Stations not only resulted in the CARP’s inability to determine a reasonable marketplace royalty rate applicable to these services, but also led the panel to adopt a royalty scheme insensitive to the ability of these services to provide data or to whether the concomitant reports of use would be “reasonable,” as is required by the statute.

The charge by Congress to the CARP was to develop the “rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.”⁴ The CARP failed to consider, as it should have, that reports of use would be among the terms a willing buyer would most definitely negotiate in the marketplace. It is not speculative to assert that a willing buyer in the marketplace would not agree to a reporting scheme with a cost approaching or exceeding the royalty to be paid under the negotiated license. For the services involved in the CARP, automated detailed recordkeeping of the performances of sound recordings is often a normal part of their business operations; however, such is not the case for many of the services not participating in the CARP, and the cost to these services of reports of use should have been factored into the rate determination and accompanying terms. The rates and terms recommended by the CARP and ultimately adopted

³ Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 2000-9, CARP DTRA 1 & 2 (2002), p. 89-90 (the “CARP Report”).

⁴ 17 U.S.C. § 114(f)(2)(B).

by the Librarian were anything but clearly representative of a theoretical marketplace outcome, particularly with respect to Educational Stations.

The CRB now appears ready to institute reporting format regulations built upon an extremely defective foundation, thus potentially compounding errors already made.

The second problem is the apparent misreading by the COPs of 17 U.S.C. §§ 114(f)(4)(A) and 112(e)(4). The statute only requires copyright owners “receive *reasonable* notice of the use of their sound recordings” from the services that make digital transmissions of sound recordings (emphasis added). Through prior proceedings the COPs requested the Librarian adopt recordkeeping regulations based on a faulty reading of the statute to require exhaustive *perfect* notices of use of sound recordings. Although the Librarian did not adopt entirely the recordkeeping regulations requested by the COPs, those regulations that have been previously proffered by the Librarian have not been properly defended as “reasonable” for all services subject to the statutory licenses. As the CRB accurately noted in the Request, responsibility for the recordkeeping regulations has now been transferred to that body, which also now bears the obligation to correct the Librarian’s failure to adequately consider the reasonableness of the recordkeeping regulations with particular respect to the services that CBI represents.

The services participating in the CARP proceeding, for the most part, represented relatively new industries. As such, these services often employ comparatively advanced technologies. In contrast, many Educational Stations are licensed traditional broadcast radio stations that also simulcast programming via Webcasting. Those Educational Stations without a licensed broadcast facility most regularly employ models of operation emulating broadcast radio

operations. Therefore, Educational Stations are organized under operational models developed over many decades.

The satellite music services and large commercial Webcasters represented in the CARP proceeding are comparatively few in number and therefore are not characterized by a large diversity of operational practices and technical systems. Educational Stations, on the other hand, have developed over a long time period and are characterized by broad ranges of operational practices and technical systems. In its Request, the CRB asks for the discussion of “industry standards.” Our discussion below will reveal that this request is a paradox for Educational Stations, in that the only standard within the Educational Station subgroup of services is that there are no standards.

Further, the regulations partially established by the Librarian and the proposed regulations now under consideration by the CRB do not scale well for services providing comparatively small numbers of performances. The satellite music services and large commercial Webcasters represented in the CARP each day present many millions of performances subject to the statutory license. Educational Stations, on the other hand, are typically characterized by comparatively very small numbers of performances each day, often to only one or two dozen listeners at any one time. The overhead of generating metadata, developing automated reporting systems, acquiring requisite technology, and related labor costs might be fairly small and reasonable when amortized over the very large number of performances that are normal for commercial services; however, these same costs are not proportionately reduced and are wholly unreasonable when associated with small numbers of performances that are the case with Educational Stations.

The *reasonable* notice of use of sound recordings required under the statute cannot justify the adoption by the CRB of regulations that would require the retooling of long-established and varied business practices represented by the Educational Stations. For the not-for-profit Educational Stations, the cost of compliance with regulations already adopted by the Librarian and prospectively to be adopted by the CRB is not trivial.

The regulations adopted by the Librarian and the proposed regulations now under review by the CRB under this Request are together based on the practices of the rather new satellite music and large commercial Webcasting industries. *Reasonable* notice cannot mean the imposition of data and formatting requirements for one industry, with a limited number of technologically advanced services, on a disparate industry with potentially thousands of stations which have been in development for nearly a century.

Previous comments by the COPs have asserted that SoundExchange should not now be required to retool that designated receiving agent's data administration systems, designed specifically around reports of use previously submitted by the relatively new and large satellite music and commercial Webcasting industries, in order to allow for reasonable reports of use of sound recordings by Educational Stations. The COPs cannot deny that such data processing systems were developed with full knowledge that additional dissimilar services would eventually be required by the statute to supply reports of use of sound recordings. Indeed, the COPs vigorously pursued the enforcement of the new statutory performance right on Educational Stations and others.⁵ The sole failure of the COPs to adequately anticipate the practices of existing industries while developing the SoundExchange data processing mechanism is not the fault or responsibility of the Educational Stations. Unlike the Educational Stations, whose

⁵ See, for example, 65 Fed. Reg. 14227 (March 16, 2000), which was issued in response to a March 1, 2000, RIAA petition for rulemaking.

practices have been developed over many years and could not have reasonably anticipated the statutory reports of use yet to be fully defined, the COPs' data processing system should have been built to accommodate practices that could have been sensibly projected. These Educational Stations should not now be forced to bear the unreasonable costs directly associated with the failure of the COPs to adequately develop their own business model.

At bottom, CBI firmly believes that the continuing controversy over reports of use of sound recordings has been needlessly prolonged by attempts to craft a "one size fits all" solution. The record, even before the instant Request, has been more than adequately developed to establish that great differences exist in the various services subject to the statutory digital sound recording performance license. For Educational Stations, the most cost-appropriate recordkeeping solution – from the perspectives of both the COPs and the Educational Services – should closely follow the precedent already long established by the statutory licenses for noncommercial broadcast stations performing musical works.⁶ CBI does not argue that such a reporting regulation should be adopted for all services under the Section 112 and 114 licenses, but most certainly for the very specific sub-class of the Educational Stations.

The COPs have resisted such a plan because, in SoundExchange's limited experience, some of those due royalties would be under-compensated by a distribution system administered under such a regulation. The CRB should not ignore that this very reporting system has been successfully implemented for several decades under the separate statutory licenses. CBI does not argue that a reporting system analogous to those submitted to the performance rights societies would be a *perfect* solution, as is sought by the COPs, but it would be *reasonable*. The cost to Educational Stations to produce the requested perfect reports of use of sound recordings would not be commensurate with the royalties to be paid by those services. Likewise, the probable cost

⁶ 37 C.F.R. § 253.5(e).

to SoundExchange for the processing of such requested perfect reports of use would quickly consume the royalties paid by Educational Stations, thus ultimately leaving no funds to be distributed to the COPs, as is intended by the statute.

II. Fundamental Economic Considerations of the Cost of Reports of Use for Educational Stations.

CBI agrees wholeheartedly with the CRB's characterization of the records of use rulemaking as "nettlesome and frustrating." Before directly addressing the very specific questions listed in the Request, an extremely basic, non-speculative analysis of the economic implications of the proposed recordkeeping requirements and format should be instructive.

Under a voluntary agreement reached under the provisions of the Small Webcasters Settlement Act of 2002 ("SWSA"), the bulk of Educational Stations, at institutions with student enrollment under 10,000, presently pay an annual blanket royalty fee of \$250; the remainder of stations pay an annual fee of \$500.⁷ The cost of administering *reasonable* reports of use of sound recordings should clearly be but a fraction of these royalty amounts.

An assumed overhead cost for generating metadata not otherwise required by the established operation of each Educational Station, compiling compliant reports of use, and submitting the resulting formatted reports to the COPs should reasonably be no more than ten percent of the annual royalties to be paid by those services. For the \$250 annual royalty paid by most Educational Stations, the annual overhead cost for providing statutory records of use therefore should reasonably be no more than \$25. At the now-prevailing \$5.15 federal minimum wage, the annualized labor expenditure within this reasonable recordkeeping overhead would provide a maximum of just 48 seconds of labor *per day* for the purpose of generating and

⁷ *Notification of Agreement Under the Small Webcaster Settlement Act of 2002*, 68 Fed. Reg. 35008-35012 (June 11, 2003).

administering the reports of use. This figure would be reduced by any costs for new technology or software necessary for an Educational Station to accomplish the reporting task. Even without detailed further cost accounting, the CRB should easily recognize that compliance with the proposed regulations would be impossible within the above figures. Should the COPs be of the opinion that the assumed recordkeeping overhead for the Educational Stations of ten percent of the annual royalties paid by each of those services is less than reasonable, an explanation in reply comments of an alternative reasonable figure is to be expected.

The above example simply and clearly demonstrates that the cost of compliance for the proposed regulations, the core of many of the individual questions in the Request, is likely to significantly exceed any measure of reasonableness.

III. Responses to the Factual Questions in the Request.

a. How expensive and time-consuming would it be for a typical noncommercial webcaster on the Internet to compile spreadsheets using Microsoft Excel? Using Corel Quattro Pro?

Before discussing specifically the issue of the use of spreadsheets for generating the proposed reports of use, CBI must remind the CRB that a significant cost to Educational Stations would come from the underlying generation of whatever data is to be entered into such a program – the so-called metadata. We incorporate here, by reference, the many previous citations by CBI and other educational services detailing the operational nature and diversity of Educational Stations. A large proportion of Educational Stations do not presently maintain an electronic record of the performances of sound recordings. Other Educational Stations do not maintain any records of performances. The cost to Educational Stations to create this data, not

otherwise required for their existing operations, must be considered in any determination of a *reasonable* reporting requirement.

The expense to Educational Stations to merely acquire the technology and software to make use of the proposed spreadsheet option would exceed the annual \$250 royalty paid by those stations. As has been previously documented in the recordkeeping proceedings, many Educational Stations do not possess any type of computer platform, beyond what is required to produce the Webcast. At present academic pricing, a basic desktop computer system is available from Dell, Inc. for approximately \$830.⁸ Present academic pricing for the Microsoft Office Student and Teacher Edition 2003 is approximately \$130.⁹ Even without consideration of any labor expense, the cost of technology and software alone for the proposed spreadsheet reporting option would be nearly 400% of the royalties paid by most Educational Stations, and 200% of the highest blanket royalties paid by any Educational Station. As has already been detailed above, a very small amount of labor – even with no consideration for the cost of technology and software – would, under the proposed reporting scheme, result in Educational Stations bearing reporting costs significantly in excess of royalties. Even the proposed spreadsheet reporting option would result in a regulation that is not *reasonable*.

As demonstrated by IBS/WHRB, it is likewise economically impractical for the COPs to process the data they are requesting.¹⁰ The only economically-defensible solution to the dilemma facing the CRB in this proceeding is to use sample technologically-simple data – such

⁸ Academic pricing of \$831.60 retrieved from <http://www.dell.com> (Dell Higher Education Store) on August 24, 2005.

⁹ Academic pricing of \$131.00 retrieved from <http://www.shi.com> (SHI Academic Catalog) on August 24, 2005.

¹⁰ Joint Reply Comments of Intercollegiate Broadcasting System, Inc. and Harvard Radio Broadcasting, Inc. (“IBS/WHRB”), July 21, 2005.

as the reporting standard already in place for the performance rights societies – or, in the alternative, proxy data.

b. What are the practical difficulties in converting a Microsoft Excel or Corel Quattro Pro spreadsheet into ASCII? How costly is it?

The proposal by SoundExchange to develop a spreadsheet template is welcomed, even if it does not resolve the economic problems with the proposed reporting regulations. In doing so, however, SoundExchange has apparently found that it is not a simple proposition to save Microsoft Excel spreadsheet information as ASCII data, particularly with the non-standard delimiter requirements that they have proposed. Their proposed solution, using a proprietary macro developed by Microsoft, is well intended but misguided and extremely problematic. CBI is not aware of any progress to develop a similar macro for data conversion from the Corel Quattro Pro software.

First, SoundExchange offers the Excel spreadsheet solution with a disclaimer that it will not support the template or the macros, regardless of the issues that might arise in this unproven hybrid software application. If the CRB is to endorse and adopt the proposed spreadsheet option for reports of use, the designated receiving agent should be charged with making the conversion from the native spreadsheet document. SoundExchange has developed, with Microsoft, the experimental macro the COPs propose to be used; therefore, SoundExchange is best positioned to expeditiously and reasonably resolve any issues with its use. A single point of contact with Microsoft to solve any problems that develop would be much more efficient than to require hundreds or thousands of services to flounder with unknown support. Further, batch conversion of the native spreadsheet files by SoundExchange would also accommodate formatting the data into the peculiar configuration SoundExchange desires, as discussed below.

Second, executing macros in Microsoft Excel are a known security problem for users. As a result, information technology policies on many educational campuses would not allow users sufficient privileges to allow for the execution of the proposed macro.

Third, when CBI attempted to use the template provided by SoundExchange on a Macintosh computer platform running the OS X operating system, the macro failed.

c. What are the kinds of technical support that are typically needed in preparing Microsoft Excel and Corel Quattro Pro spreadsheets and converting them to ASCII? How would that technical support be available to a webcaster and what costs would be involved?

Online support from Microsoft does not include any guidance regarding the use of the macro proposed by SoundExchange. The availability of local technical support to Educational Stations will vary greatly from institution to institution, depending, for example, on whether the station is classified as a club or is part of an academic department. The need for technical support is much greater at Educational Stations than in the corporate environment, due to the large number of untrained students and volunteers using the systems and the natural student turnover endemic of the educational environment.

d. What, if any, commercially available software is available that could be used to compile records of use? Would such software produce records of use that are format compatible with SoundExchange's data processing system? What are the costs associated with such software?

CBI is not aware of *any* off-the-shelf software application that would accommodate the various operational models at the Educational Stations while satisfying the requirements of the proposed reporting requirements. Because of the very specialized nature of the data requirements and file formatting proposed by the COPs, it is unlikely that any such system will be developed until a determination is reached by the CRB. As such, only through pure

speculation could one imagine the cost of any such anticipated software solution. However, because of minimal level of use and performances of sound recordings by Educational Stations and the amount of royalties paid by these services, *any* software cost would contribute significantly to the *reasonable* burden to these not-for-profit services.

e. What are the average estimated costs of creating and maintaining a Web site for receipt of records of use? What are the security concerns and how may they be addressed? Is there a commercially available Web site software that could perform this task? Is Web site software available that could be adopted from other SoundExchange uses?

f. To what extent can a SoundExchange-hosted Web site reduce costs associated with records of use? Can it assist in organizing and cataloging delivered data and, if so, in what fashion and to what extent?

Such an accommodation would help services more easily submit files, while at the same time allowing for the resolution of questions raised elsewhere. A Web-based portal would allow SoundExchange to automatically name the submitted file in any format it desires. Such a system could also verify the size of the file and provide the service with a receipt which would demonstrate that a file of a certain size and format was submitted to SoundExchange by the service. No other system proposed would allow the services to automatically receive instant verification of delivery in this manner.

g. Could a SoundExchange-hosted Web site be required to provide services with access to prior submitted records of use? For how long?

This requirement would provide the services with a means to demonstrate compliance with the proposed reporting regulations, which the services otherwise would not be able to do under the various submission schemes proposed by the COPs. The data should be maintained for a minimum of three years, which is the same as the limitation for audits.¹¹ Such access would

¹¹ See 37 C.F.R. § 261.6 (b).

require rigid security measures to prevent unauthorized access by others to confidential and proprietary information.

h. What is the ASCII standard for reporting days, months and years? Is one way more cumbersome or expensive than the other?

The International Organization for Standardization specifies the de-facto numeric representation of date and time.¹² This international standard states that the date should be in the format "YYYYMMDD", where "YYYY" is the four digit year, "MM" is the two digit month, and "DD" is the two digit day. Optional hyphens between the elements can be omitted if compactness of the representation is more important than human readability. This standard notation helps avoid confusion in international communication and has several important advantages for computer usage in that, compared to other date notations, it is easily comparable and sortable with a trivial computer comparison routine.

i. What is required to be technologically capable of assigning file names of the length proposed in the NPRM?

The International Organization for Standardization also provides a file and directory-naming standard.¹³ Under Level 1 of that standard the number of characters of the file name is restricted to eight and the number of characters of the extension is restricted to three. Levels 2 and 3 of the standard limit the total length of the name and extension is restricted to 30 characters, excluding the period separating the elements. Older operating systems are limited to compliance with the Level 1 standard.

¹² International Organization for Standardization ISO 8601:1988.

¹³ International Organization for Standardization ISO 9660:1988.

CBI believes the CRB should adopt a Comma Separated Value ("CSV") file format for any electronic reporting requirements that might be adopted, as we will discuss further below. The CSV format is often used to exchange data between disparate applications. The file format, as it is used in Microsoft Excel, has become a pseudo standard throughout the computer industry, even among non-Microsoft platforms. Microsoft advocates that such a file carry the extension ".csv". The resulting file can be opened in a spreadsheet program like Microsoft Excel or used as an import format for other programs. By adopting the CSV standard, the CRB could simultaneously resolve many of the macro issues discussed above.

j. What standing does RLI have to request copies of the reports of use?

k. How expensive and burdensome would it be, on average, for services to provide RLI with records of use in addition to SoundExchange?

l. Must all the format requirements be the same?

The burden of proof of standing in this proceeding, with respect to RLI lies solely in the hands of RLI.

CBI believes that the sole receiving agent should be the singular point of contact for the collection of both data and royalties. All subsequent distribution of data and royalties are matters for the receiving agent and any additional distribution agent or agents to resolve. No additional burden should be placed on services once they have met their statutory requirements.

Given the extraordinarily difficult process of determining the content and format of recordkeeping to date, any attempt, particularly at this late date, to ask for additional content and format requirements would unduly complicate the proceeding. CBI strongly objects to any

newly-proposed additional burdens placed on the services it represents in this proceeding. If the CRB opts to entertain the request of RLI, CBI respectfully reserves further comment until RLI has demonstrated cause.

m. Files With Headers.

CBI addresses this series of questions in bulk because it believes other issues are most crucial to a determination of *reasonable* reporting regulations. CBI incorporates by reference its previous objections to redundancy of information between the proposed file header and file name and redundant information – in some instances not at all applicable to Educational Stations – proposed to be required to be entered repetitively for each record.

The CRB should adopt an electronic reporting format in conformity with common uses elsewhere in the computer industry, to maximize the potential of interoperability between the required reporting standard and other applications, and to minimize costs to both the COPs and services. For this reason, CBI strongly advocates the specification of the CSV file convention for any electronic reporting option that might be adopted. Under Microsoft's default specifications for CSV files, only the first line of the file can contain header information. The CRB should not adopt an electronic reporting requirement at odds with computer industry standards.

CBI believes that the regulations must otherwise be as flexible as possible. Rapidly changing software and technologies must be accommodated in this proceeding; otherwise, the rigid regulations will rapidly become dated and will create a senseless need to revisit the reporting issues within a very short period of time. The involvement in minutia concerning

detailed formats is an unnecessary drain on the resources of both the COPs and services – not to mention the CRB.

n. What are the industry standards for use of field delimiters and text delimiters? Should particular ones be specified in the regulations? To what extent is flexibility acceptable in their selection?

o. What problems will be created by allowing the use of commas and quotes as field delimiters and text indicators, respectively? How can such problems, if any, be avoided?

As has been already established above, the CSV format most clearly represents a computer industry standard for formatting data. Microsoft's specification for CSV report has the following characteristics:

1. Each record is one line,
2. The first record contains headers for all the columns in the report,
3. All lines have the same number of columns,
4. The default field delimiter string is a comma (,),
5. The record delimiter string is the carriage return and line feed (<cr><lf>),
6. The text qualifier string is a quotation mark ("),
7. If the text contains an embedded delimiter string or qualifier string, the text qualifier is placed around the text, and the embedded qualifier strings are doubled,
8. Fields may always be delimited with double quotes, and
9. Leading and trailing space-characters adjacent to delimiters are ignored.

p. What are the costs/benefits of requiring all data fields to be in upper case characters? Will the SoundExchange data processing system accept lower case characters in a data field and combinations thereof?

q. What is the industry standard for data fields?

For those Educational Stations that do employ some type of computer-based server system for the playback of sound recordings, sound recording information is entered in a mixed case format, as is the broadcast industry standard, to facilitate use of this information by on-air announcers. Services should not be required to reformat existing databases, and thereby altering significantly existing operations, and they should not be required to develop additional databases merely for the convenience of SoundExchange. If SoundExchange needs the data in all upper case characters, batch conversions could be easily performed once the report files have been received by the designated receiving agent.

r. What problems, if any, does allowing abbreviations within data fields present to SoundExchange's data processing system? How can these be addressed?

s. Can a set of rules be developed that permit abbreviations within data fields and, if so, what should these rules be?

t. What are the burdens and costs associated with the creation and maintenance of a database of sound recording titles, album titles, artists' names, etc. by SoundExchange? What should be the functionality of such a database? How could such a database be utilized to reduce the overall costs of reporting records of use?

CBI reiterates that it is additionally concerned about any proposed requirement precluding the use of abbreviations and the like in order to conserve space in record fields. Systems already employed in many radio stations – again, not all Educational Stations have this level of technological sophistication – have inherent limits on the number of characters in each field and would be costly to replace. For some stations, existing metadata files are intended to service the terrestrial digital “HD Radio” function called Program Associated Data (“PAD”). Under the established standards for the HD Radio Main Program Service, data messages – which include much information in addition to PAD sound recording data – cannot exceed a total of

1024 bytes; therefore, stations must deliberately restrict the size of individual fields of metadata, including the artist and title information. Further, some broadcast stations make use of Radio Broadcast Data System ("RBDS") to display artist and song data on radio receivers, through a function called RadioText ("RT"). Existing databases at stations employing such technology have been developed with consideration to established international standards.¹⁴ Under those standards, the RT field is limited to a total of 32 characters for the combined length of the artist name *and* song title. Further, to the extent that systems are deployed, there would be unnecessary burden of identifying all instances of abbreviations and making corrective entries.

u. Are there industry standards for compiling data files without headers and, if so, what are they? What are the costs/benefits of compiling data files without headers versus those with headers?

v. How flexible can the format requirements be for files without headers? What are the options?

w. Can categories of data be submitted in separate files or must it all be submitted in a single file? What is the capability of SoundExchange's data processing system to handle more than one file of data per Service?

x. To what extent could it be permissible to allow automated services to report playlist data in native form to SoundExchange?

For the CSV format advocated by CBI, file headers are entirely optional.

CBI concurs with NRBMLC/Salem that recurring data, such as aggregate tuning hour information that will be the same for each record, should not be required to be repetitively reported for each sound recording performance, and services should be permitted report such information separately.

¹⁴ CENELEC/EBU European Standard EN 50067:1998.

The wording of the CRB's question here suggests that the SoundExchange data processing system represents some sort of standard to which Educational Stations should be required to adhere. That is not the case. As we discussed above, SoundExchange developed their system with full knowledge of the breadth of services it expected to be providing reports of use, but in doing so the designated receiving agent did not plan adequately. That is singularly the fault of SoundExchange; Educational Stations should not be forced to comply with an unreasonable regulation merely to compensate for SoundExchange's gross failure.

y. Did Congress, in 17 U.S.C. 114(f)(4)(A) and 112(e)(4), require the Copyright Royalty Judges to prescribe particular formatting and delivery requirements at the level of detail described in the April 27, 2005, notice of proposed rulemaking? Is there some relevant set of Internet conventions or practices that could guide the Board in setting data submission standards here?

Congress has made no such requirement of the CRB. Though the Section 112 and 114 statutory licenses are comparatively new, statutory reports of use are not. Section 118 of the statute contains language nearly identical to the language of Sections 112 and 114:

“...shall also establish requirements by which copyright owners may receive reasonable notice of the use of their works under this section, and under which records of such use shall be kept by public broadcasting entities.”¹⁵

The regulations long ago promulgated in response to that directive contain no requirements even remotely approaching the burdensome reporting regulations partially adopted by the Librarian and the proposed regulations now under consideration by the CRB.¹⁶ In the case of the four sections establishing requirements of reports of use for noncommercial broadcast stations, the entirety of the reporting regulations comprise but a single paragraph each. The Educational

¹⁵ 17 U.S.C. § 118(b)(3).

¹⁶ See 37 C.F.R. §§ 253.3(e), 253.4(c), 253.5(e), and 253.6(e),

Stations represented here in answer to the instant Request are the very same services described in Section 253 of the Rules.

When faced with such strikingly similar statutory language, the CRB must act consistently and follow the precedent of the established regulations. To do otherwise would be patently arbitrary. CBI's sustained argument has been that the most appropriate *reasonable* reporting requirements for Educational Stations are the very same rules that have long applied to these stations under Section 253 of the Rules. The reporting requirements under Section 253 of the Rules cannot be reasonable in that context and not also reasonable here.

z. Could a system of webcast sampling, analogous to the sampling performed by performing rights societies in the context of broadcasting, meet the record-of-use requirements of 17 U.S.C. 114(f)(4)(A) and 112(e)(4)?

As discussed above, for Educational Stations the answer to this question is unequivocally "yes."

aa. Under the provisions of any final rule adopted to implement the notice and record of use requirements of 17 U.S.C. 114(f)(4)(A) and 112(e)(4), either copyright owners (in the form of their agent, SoundExchange) or licensees will be burdened with having to change their existing data systems. From a legal and a policy perspective, on whom is it most appropriate to place these burdens? Is the court's discussion in *Amusement and Music Operators Association v. Copyright Royalty Tribunal*, 676 F.2d 1144, 1154-55 (7th Cir. 1982), cert. denied, 459 U.S. 907 (1982) ("depriv[ing] copyright owners of increased remuneration for the exploitation of their works by showing that some * * * operations will become unprofitable is * * * unsound and unjust") pertinent to this inquiry?

CBI does not argue here that the proposed regulations should not be adopted because such action will deprive the COPs of increased remuneration, although this is exactly the likely outcome for the COPs.

Passing over for the moment the potential for these proposed regulations to drive away entirely some Educational Stations, the overarching consideration by the CRB must be whether these regulations are *reasonable*, even if *no* service becomes unprofitable – the Educational Stations are all, by definition, not-for-profit. The record here now and previously demonstrates that the proposed regulations are not *reasonable*. They are not reasonable because, for Educational Stations, they diverge radically from previous regulatory determinations in response to virtually identical statutory language applying to exactly the same services. They are not reasonable because of the associated burdens and costs of compliance for Educational Stations – even if the regulations do not drive some or all Educational Stations from Webcasting.

The Court did not accept the claim of economic hardship because the assertions were supported by anecdotal testimony that did not necessarily form a representative picture of the industry. Here, CBI argues that, even at the prevailing federal minimum wage, the cost of labor for its members to comply with the proposed recordkeeping regulations would easily exceed the royalties to be paid by our members – this is not anecdotal, but factual. CBI separately demonstrates, factually, that the acquisition cost of technology and software – even for a proposed compromise assumed to be less expensive than alternatives – would easily exceed the royalties paid by the Educational Stations.

Congress has been clear that it does not intend for Educational Stations to be driven economically from Webcasting. The very purpose of a statutory license is to ensure that particular services are available to the consumer – in some cases Congress determines that the value for society to have access to certain intellectual property outweighs the ownership interests of the COPs. In this case, Congress has been particularly overt in expressing its intent with

regard to the Educational Stations when it passed the SWSA.¹⁷ With that law Congress intervened to allow temporary relief for Educational Stations through the ability negotiate a rate structure, fees, terms, conditions, and notice and recordkeeping requirements separate from the burdensome determinations of the Librarian. Clearly, Congress expected that reasonable determinations of royalties, terms, and reports of use for Educational Stations would follow the expiration of the SWSA – otherwise, that Act would have been moot from its outset. The specific inclusion of notice and recordkeeping in the SWSA reveals that these requirements were of special concern that subsequent regulations not be so oppressive that they drive Educational Stations from Webcasting, just as the statutory licenses are intended to protect Educational Stations from predatory licensing fees. Congress plainly does not consider Educational Stations to be expendable “marginal constituents” described in *Amusement and Music Operators Association*.

The *Amusement and Music Operators Association* decision implies that marginal constituents of an industry might be acceptably forced from business by the increased cost of regulation. Equally valid from this lesson is truth that, at the margins, some reports of use of sound recordings are not economically and reasonably achievable. The CRB should not buy in to the COPs’ contention that the statute requires perfect reports of use of sound recordings from all services, because that is simply not the case. Under a *reasonable* requirement for reports of use, the COPs might not receive complete information from some legitimate services at the lower margin.

The comparison in this question of the relative burdens on the COPS and Educational Stations for changing existing data systems is a false one. The COPs developed their data

¹⁷ *Small Webcaster Settlement Act of 2002*, Pub. L. No. 107-321, 116 Stat. 2780 (December 4, 2002).

system in response to the statute, based on a non-representative handful of large satellite music services and commercial Webcasters, and with the full knowledge that other operational models were in place at other services. The folly of their proposed reporting standard is dramatically evidenced by its feckless disregard for international standards of data management predating the statute. The COPs' expectation that first the Librarian and now the CRB would rubber stamp this albatross proposal is an affront to reasonableness. The operational practices of Educational Stations, on the other hand, were well established at the inception of the statute and therefore these services could not have reasonably developed their systems to specially accommodate the COPs. Congress certainly did not intend that the passage of the statute would force the radical retooling of the Educational Stations' long-established practices.

V. Conclusion

To CBI, it is striking to note that the vast majority of the issues cited by the CRB in the Request center on the comments of not-for-profit services. This observation alone brings home CBI's contention that the controversy over reports of use persists primarily because of attempts to inappropriately force a single standard on too broad a range of services.

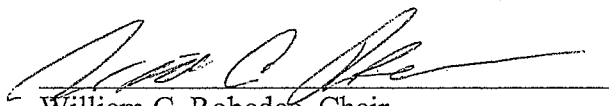
CBI presented a detailed proposed settlement to the COPs, covering reports of use of sound recordings, sufficiently in advance of the deadline for responses to this Request to enable resolution of this issue. The COPs have yet to accept our offer, or to provide an alternative proposed agreement.

Should the determination of regulations of reports of use ultimately fall on the CRB, for Educational Stations the precedent of previous decisions for separate statutory licenses –

specifically the Section 118 licenses – must be followed. Additionally, the proposed regulations under review through this Request demonstrably fail the standard of reasonableness demanded by the statute. Any determination must be made with an awareness that, under the SWSA, Educational Stations have not heretofore been required to gather, retain or report any records of use of sound recordings, and reasonable allowances must be made accordingly. Above all the CRB must remedy and reverse the inherited series of ill-informed decisions that have made resolution of this issue elusive.

Dated: August 25, 2005

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'William C. Robedee', is written over a horizontal line.

William C. Robedee, Chair
Collegiate Broadcasters, Inc.
6100 Main Street, MS-529
Houston, TX 77005
713-348-2935